



Osgoode Hall Law School of York University  
**Osgoode Digital Commons**

---

Articles & Book Chapters

Faculty Scholarship

---

2009

## Mistake, Forged Cheques and Unjust Enrichment: Three Cheers for B.M.P. Global

John D. McCamus

*Osgoode Hall Law School of York University*, [jmccamus@osgoode.yorku.ca](mailto:jmccamus@osgoode.yorku.ca)

### Source Publication:

Canadian Business Law Journal. Volume 48, Issue 1 (2009), p. 76-101.

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/scholarly_works)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

---

### Recommended Citation

McCamus, John D. "Mistake, Forged Cheques and Unjust Enrichment: Three Cheers for B.M.P. Global." *Canadian Business Law Journal* 48.1 (2009): 76-101.

This Commentary is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

## UNJUST ENRICHMENT AND THE SUPREME COURT OF CANADA: TWO COMMENTS ON *B.M.P. GLOBAL DISTRIBUTION INC. v. BANK OF NOVA SCOTIA*\*

### MISTAKE, FORGED CHEQUES AND UNJUST ENRICHMENT: THREE CHEERS FOR *B.M.P. GLOBAL*

#### 1. Introduction

The recent decision of the Supreme Court of Canada in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*<sup>1</sup> is arguably one of the most important restitution decisions to come down from the court in recent years. The case concerned the recovery of moneys paid under a mistake of fact and thus deals with one of the central issues of the law of restitution. Importantly, the decision authoritatively confirms that the Canadian law of mistaken payments has been restated and modernized in alignment with the analysis provided by Goff J. in *Barclay's Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*<sup>2</sup> The particular fact situation in which the mistaken payments rule was applied dealt with a payment by a drawee bank on a cheque that contained, in an undiscovered fraud, a forged signature of the drawer. This is one of the more interesting problems in the law of mistaken payments and has been the subject of conflicting signals in prior English and Canadian mistaken payments law. In *Global*, the court offers a clear and elegant analysis of this problem and holds that, in such circumstances, the drawee bank is entitled to recover the moneys mistakenly paid, either from the collecting bank or the payee, provided that, in each case, the recipient is not a holder in due course

\* Following the release earlier in 2009 of the Supreme Court's decision in this unjust enrichment case, we received the following two unsolicited comments by Professor John McCamus and Professor Mitchell McInnes. We decided to publish both comments, not only because of the eminence of the authors as restitution scholars but also because they entertain fundamentally different views about how unjust enrichment cases should be decided by the Supreme Court. Readers' comments on this controversy, not to exceed five hundred words, will be welcome and should be e-mailed to [j.ziegel@utoronto.ca](mailto:j.ziegel@utoronto.ca) (ed.).

1. (2009), 304 D.L.R. (4th) 292, 386 N.R. 296 (S.C.C.) (*Global*).  
2. [1980] Q.B. 677.

and has not suffered a detrimental change of position in reliance on the receipt of the payment.

Perhaps the most important contribution of this decision, however, is at the level of general principle. The nature of the relationship between the underlying unjust enrichment principle and the enormous body of existing restitutionary law has become somewhat destabilized in recent years as a result of the decision of the Supreme Court of Canada in *Garland v. Consumers Gas Co.*<sup>3</sup> and the interpretation placed thereon by some scholars. Essentially, the controversy concerning the significance of *Garland* rests on whether the *Garland* analysis of the unjust enrichment principle should be considered to be a doctrine or rule of law that has overruled and replaced all prior restitutionary law or, alternatively, should be considered to have the more traditional role of providing a principled basis for supplementing the existing law by filling in gaps, extending doctrines in new directions, and modifying prior law in light of its inconsistency with the general unjust enrichment analysis. The decision in *Global* is consistent with what I consider to be the correct interpretation of Canadian law — that it is this more traditional role for the unjust enrichment analysis that is envisaged by the *Garland* decision. I shall deal with each of these three topics — mistake, forged cheques and unjust enrichment — in turn.

The facts underlying the dispute in *Global* are striking. Mr. Hashka and Mr. Backman were the principals of B.M.P. Global Distribution Inc. (BMP), a company engaged in the business of distributing non-stick bakeware in British Columbia. Having met and been impressed by a Mr. Newman of Sunrise Marketing on a trip to the United States, they raised with Newman the possibility that he might become the distributor of the product in question in the United States. When Newman later contacted the two in Vancouver, Hashka suggested a price for the distribution rights in the United States of US\$1.2 million by, it was conceded, “pulling the number out of the air”.<sup>4</sup> Sometime later, Hashka and Backman received a cheque payable to BMP for Cdn \$904,563 drawn on the account of a corporation named First National Financial Corporation at a Toronto branch of the Royal Bank of Canada (RBC). The cheque arrived without a cover letter in an envelope indicating the sender to be one E. Smith of Mississauga, Ontario.

Although Hashka and Backman may have initially assumed that there was some connection between the cheque and their dealings

3. (2004), 237 D.L.R. (4th) 385, [2004] 1 S.C.R. 629.

4. *Supra*, footnote 1, at para. 2.

with Mr. Newman, it was accepted at trial that neither the drawer of the cheque nor the sender were known to either Hashka or Backman nor were either of them apparently linked to Newman. Later the same day, without making any attempt to contact either Smith or First National, Hashka took the cheque to the Burnaby branch of the Bank of Nova Scotia (BNS), at which he and Backman conducted their own banking and the banking related to the affairs of BMP. Hashka deposited the cheque in the BMP account at the Burnaby branch. Prior to the deposit, the current balance of the account was \$59.67. Understandably, BNS did not provide immediate access to the \$904,563. The branch manager advised Hashka and Backman that BNS would not release the funds to them until it was satisfied that the cheque was authentic. As collecting bank, BNS forwarded the cheque to RBC. In a week or so, BNS received the funds from RBC and deposited them in the BMP account.

Over the next ten days, BMP engaged in a “flurry of transactions”<sup>5</sup> that had the effect of dispersing the funds to a variety of accounts, most of them being accounts at BNS that were related in some way to the business of BMP or to Hashka and Backman themselves. Modest amounts were spent by Hashka and Backman on certain expenses. Some of the transactions might have raised a judicial eyebrow. A transfer from the BMP account of US\$20,000 to a Citibank account in New York City was made. Hashka and Backman claimed that they did not know who the holder of the account was nor did they explain the nature or purpose of the transfer. A second transaction, suggesting, perhaps, a rather naïve understanding of the law of tracing, involved the issuance of a certified cheque for \$300,000 drawn by BMP on its BNS account to the order of BMP and subsequently deposited in an account with the Bank of Montreal. A few days later, a bank draft issued by BMO for \$300,100 was deposited by BMP in its account at BNS. Hashka and Backman provided no explanation for this somewhat unusual transaction.

A week after this latter transaction, RBC notified BNS that the original cheque for US\$904,563 was forged. RBC asked for the assistance of BNS in attempting to retrieve the funds. BMP took the position, accepted by the courts below, that it was innocent of the fraud. Accordingly, in its view, it was entitled to retain the moneys remaining in the various accounts held at BNS. By this point in time, the total of the funds remaining in these accounts was \$776,650.48. The legal issues relating to the ability of RBC, as a drawee bank that

---

5. *Ibid.*, at para. 4.

had mistakenly paid out on a forged cheque, to recover the moneys paid were thereby engaged.

Matters did not end there. In response to BMP's insistence that it was entitled to retain the amounts advanced, BNS then purported to restrain the amounts remaining in the BMP and related BNS accounts. Three weeks or so later, RBC and BNS entered into an agreement pursuant to which RBC warranted that the cheque in question was a forgery and that the proceeds deposited in BMP's account at BNS were the proceeds of fraud. Further, BNS agreed to transfer to RBC the restrained funds in return for an undertaking by RBC that it would indemnify BNS for any losses it suffered as a result of the restraint and transfer of the funds. Pursuant to the terms of this agreement, BNS transferred \$777,336.04 to RBC.

In due course, BMP and the holders of the related accounts, including Hashka and Backman, brought a claim against BNS for damages including both the value of the restrained amounts and various items of non-pecuniary loss including aggravated and punitive damages. BNS defended the claim on the basis that BMP had never had an interest in the funds since they represented the proceeds of a forged cheque and, accordingly, that none of the plaintiffs were entitled to damages of any kind. When the matter ultimately surfaced before the Supreme Court of Canada, however, the court was of the view that the critical question to be decided was whether RBC had a right, at common law, to recover moneys mistakenly paid out on a forged cheque, either from BNS, the collecting bank, or from the ultimate payee, BMP. In this rather roundabout way, then, the current position of Canadian law on this important point surfaced for the court's consideration.

## 2. The Basic Mistaken Payments Rule

One of the important contributions made by the decision in *Global* is that it provides authoritative confirmation from our highest court that the basic rule relating to the recovery of mistaken payments has been restated for purposes of Canadian common law in the form of the rule articulated by Goff J. in *Barclay's Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*<sup>6</sup> It is not surprising that the co-author of the leading English text on restitution<sup>7</sup> would make many valuable contributions to the law of restitution at the various stages of his illustrious judicial career. Goff J.'s modernization of the law of

6. *Supra*, footnote 2.

7. Lord Goff and G. Jones, *The Law of Restitution*, 7th ed. (London, Sweet & Maxwell, 2007).

mistaken payments in the *Simms* case is not the least of these. Prior to Goff J.'s elegant restatement of the traditional test, the then existing English and Canadian law of mistaken payments was both cumbersome and incoherent. The leading and much-quoted Canadian statement of the traditional rule was provided by Dysart J. in *R. v. Royal Bank of Canada*,<sup>8</sup> in which it was stated that a mistaken payment could be recovered by the payer from the payee provided that the following four conditions of relief were met:

- (1) The mistake must be honest;
- (2) The mistake must be as between the person paying and the person receiving the money;
- (3) The facts, as they are believed to be, must impose an obligation to make the payment; and
- (4) The receiver of the money must have no legal or equitable or moral right to retain the moneys as against the payer.<sup>9</sup>

The problems with this traditional rule have been identified by many observers<sup>10</sup> and need only a brief summary here. The first element of the traditional test is unproblematic and signals that the payer may recover a mistaken payment, provided that he has acted honestly. Thus, carelessness in the making of the payment will not preclude relief. It is widely accepted, however, that the second element in the test is incoherent. It is not clear what is signified by the requirement that the mistake be "between the parties" and the requirement is, in any event, one which is ignored in a number of leading cases. Nonetheless, the existence of the requirement within the traditional rule has continued to bedevil analysis in more modern authorities.<sup>11</sup> The third requirement appears to be the accidental by-product of a *dictum* in a leading case<sup>12</sup> and has the unfortunate consequence that, when applied strictly, recovery is allowed only in cases where the mistake concerns a fact which, if true, would impose a liability to make the payment in the question. The requirement thus precludes recovery in the context, for example, of mistaken gifts. Nonetheless, as Goff J. pointed out in *Barclay's Bank*, it is possible to imagine many different situations in which the merits of allowing

8. [1931] 2 D.L.R. 685 (Man. K.B.).

9. *Ibid.*, at pp. 688-89.

10. See, e.g., P.D. Maddaugh and J.D. McCamus, *The Law of Restitution*, looseleaf ed. (Aurora, Canada Law Book Inc.), §10:300.

11. See, e.g., *Royal Bank of Canada v. Boyce* (1966), 57 D.L.R. (2d) 683, [1966] 2 O.R. 607 (Co. Ct.). For a discussion of which, see Maddaugh and McCamus, *ibid.*, §10:300.20.

12. *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24.

recovery of mistakenly-made gratuitous payments are undeniable.<sup>13</sup>

The sentiment expressed in the fourth requirement is not problematic but, under the traditional doctrine, the central defence available to the payee would be the traditional doctrine of estoppel, a doctrine which is ill-suited to providing appropriate protection to a payee who had, in reliance on the receipt, engaged in a detrimental change of position. There are two problems with estoppel as a defence. First, it is normally considered to be available only in circumstances where the payer had actually made an explicit, but mistaken, representation to the payee that the payment was due.<sup>14</sup> The mere making of a mistaken payment would not suffice. Further, if estoppel as a defence was available to the payee, it could provide too much protection, as it constitutes an absolute bar to recovery in cases where the payee's detrimental reliance consumed only a portion of the mistaken payment.

As Goff J. (and many before him) observed in his opinion in *Barclay's Bank*, the key element in a modern reformulation of the basic mistaken payments rule was the recognition of a more satisfactory defence to recognize and protect the payee's legitimate interest in retaining the payment to the extent that the payment had induced detrimental reliance on the part of the payee. This, of course, is the modern defence of change of position. Once such a defence is recognized, as Goff J. proposed in *Barclay's Bank*, it becomes possible to generalize the grounds for relief and jettison the second and third requirements of the traditional test.

In order for Goff J. to accomplish this modernization in his *Barclay's Bank* opinion, he engaged in a masterly survey of the leading cases (by which he was bound) and demonstrated that in none of them was there a clear *ratio decidendi* which required that a mistake, to be operative, must either be "between the parties" or be a mistake with respect to a fact which, if true, imposed a liability to make the payment. Concluding his survey and careful reading of the earlier authorities, Goff J. summarized his analysis as follows:

From this formidable line of authority certain simple principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on

13. *Supra*, footnote 2, at p. 697.

14. See, e.g., *R.E. Jones Ltd. v. Waring & Gillow Ltd.*, [1926] A.C. 670 (H.L.).

whose behalf he is authorized to receive the payment) by the payer or by a third party to whom he is authorized to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.<sup>15</sup>

In short, where moneys have been paid by mistake, they are *prima facie* recoverable by the payer if the mistake *caused* the payment (whether or not the mistake may be said to be a careless one on the part of the payer) unless the payee can establish (a) that the mistake was irrelevant to the making of the payment in the sense that the payer intended the payee to have the moneys in any event (*i.e.*, regardless of the possibility of mistake), (b) the payment was required by a contractual relationship (unless, of course, it can be demonstrated that the contractual relationship is unenforceable), or (c) the payee can establish a change of position defence. This restatement of the law, commonly referred to now as the “*Simms* test”, marks a very considerable advance in terms of elegance, coherence, simplicity and ease of application over the traditional rule.

In *Global*, Deschamps J. plainly asserted on behalf of the court that the *Simms* test is to be accepted as having replaced the traditional test set forth in *R. v. Royal Bank of Canada*. This will not come as an enormous surprise to those familiar with this subject. Indeed, the Supreme Court of Canada had anticipated developments in English law by plainly recognizing the existence of the change of position defence in 1976,<sup>16</sup> thus preparing the ground for a modernization of the basic mistaken payments rule. Moreover, the *Simms* test had been referred to favourably in a number of Canadian authorities.<sup>17</sup> Nonetheless, a clear and authoritative recognition of the authority of the *Simms* test, for purposes of Canadian law, is a most welcome and valuable clarification of this aspect of the Canadian law of restitution. Turning, then, to the dispute in *Global* itself, Deschamps J. considered that the question of whether RBC was entitled to recover the moneys it had mistakenly paid on the forged cheque was recoverable, either from BNS or BMP, was to be determined by application of the *Simms* test to the rather remarkable facts of the *Global* scenario.

15. *Supra*, footnote 2, at p. 695. These principles are now commonly referred to as Proposition 1, Proposition 2(a), Proposition 2(b) and Proposition 2(c).

16. *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147.

17. See, e.g., *A.E. LePage Real Estate Services Ltd. v. Rattray Publications* (1994), 120 D.L.R. (4th) 499, 21 O.R. (3d) 164 (C.A.) and *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp.* (1994), 121 D.L.R. (4th) 53, 24 O.R. (3d) 506 (C.A.).



### 3. Applying the Rule to Mistaken Payments by the Drawee of a Forged Cheque

The application of the *Simms* test to moneys paid by a drawee bank upon a forged cheque will be of particular interest to banking and commercial lawyers. Prior to the decision in *Global*, it was widely believed that a drawee who paid over an undiscovered forged drawer's signature would have considerable difficulty in mounting a claim for the moneys thus mistakenly paid either against the payee or, as in *Global* itself, against a collecting bank who had received funds from the drawee bank and passed them on to its customer (whether the customer was a payee or endorsee of the instrument). The difficulty confronted by the drawee in such circumstances was attributed to the venerable decision in *Price v. Neal*.<sup>18</sup> In that case, the plaintiff, as drawee, had paid out on bills that had been forged and then endorsed by the forger to the defendant endorsee. The endorsee had no knowledge of the forgery. The plaintiff paid the first bill and accepted the second, paying the latter upon presentment. Once the forgeries were discovered, the plaintiff sought recovery on both instruments. Lord Mansfield denied both claims.

The proper explanation for the result in *Price v. Neal*, however, has remained obscure over the more than two centuries that have passed since the decision. In a well known article on the subject,<sup>19</sup> Dean Ames articulated various explanations for the rule. First, the results have been explained on the basis that the drawee is precluded from recovery because of his supposed negligence, this explanation resting on an assumption that the drawee ought to know the signature of the drawer. A second explanation rests on a similarly unrealistic assumption that the banker should be conclusively presumed to be estopped from asserting the existence of the forgery on the basis that payment on the instrument constitutes an at least tacit representation that the signature is genuine. Having discussed these explanations, Ames went on to identify what he considered to be the true explanation for the rule as follows:

The true principle [is however that] . . . as between two persons having equal equities, one of whom must suffer the legal title shall prevail. The holder of the bill of exchange paid away his money when he bought it; the drawee parted with his money when he took up the bill. Each paid in the belief that the bill was genuine. In point of natural justice they are equally meritorious. But the holder has the legal title to the money. A court of equity . . . cannot properly interfere to compel the holder to surrender his legal advantage.<sup>20</sup>

18. *Price v. Neal* (1762), 3 Burr. 1355, 97 E.R. 871.

19. J.B. Ames, "The Doctrine of *Price v. Neal*" (1891), 4 Harv. L. Rev. 297.

20. *Ibid.*, at pp. 298-99.

We may note, in passing, that Ames assumed that the holder of the bill has given value for the bill, a fact which is, of course, notably absent in the *Global* scenario.

Others have drawn from *Price v. Neal* support for a broader proposition to the effect that a policy favouring “finality of payment” (which, broadly speaking, favours treating negotiable instruments as equivalent to cash, where possible) would deny relief of moneys mistakenly paid by banks on forged instruments on the theory that the payer bank “is the best risk-bearer among the parties involved”.<sup>21</sup>

For a Canadian lawyer, the difficulties confronted by the drawee in a forged cheque case appeared to be compounded by the decision of the Supreme Court of Canada in *R. v. Bank of Montreal*.<sup>22</sup> The plaintiff bank, as the government’s banker, had paid out on a series of cheques forged by a public servant. The plaintiff’s claims against the collecting banks to whom the various payees had presented their cheques did not enjoy success. Again, however, the rationale for the decision is not entirely clear. In particular, the court did not offer an authoritative view of the proper explanation for the holding in *Price v. Neal*. The majority of the five-member panel, however, can be read as supporting the view that it was the detrimental reliance of the collecting banks on the payments by the payee in subsequently paying out on the cheques that precluded the drawee bank from recovery.

In *Global*, then, the court was confronted directly with a fact situation in which arguably no detrimental reliance had been suffered either by BMP itself or by BNS — at least with respect to the funds still under the control of BNS. In an analytically clear and persuasive opinion for the court, Deschamps J. held that on the very particular facts of the *Global* scenario, neither *Price v. Neal* nor *R. v. Bank of Montreal* precluded application of the *Simms* test so as to recognize the ability of RBC to recover, at common law, the moneys paid out on the forged cheque, either from BNS or from BMP itself. Given the variety of possible interpretations of *Price v. Neal*, Deschamps J. did “not accept that it provides a basis for an unqualified rule that a drawee will never have any recourse against either the collecting bank or the payee where payment has been made on the forged signature of the drawer”.<sup>23</sup> *R. v. Bank of Montreal* is properly to be explained, in the court’s view, as resting on the existence of detrimental reliance by the defendant recipient of the funds. Applying the *Simms* test, then,

21. B. Geva, “Reflections on the Need to Revise the Bills of Exchange Act — Some Doctrinal Aspects” (1981-82), 6 C.B.L.J. 269 at p. 313.

22. (1907), 38 S.C.R. 258.

23. *Supra*, footnote 1, at para. 31.

the plaintiff's mistake had caused the payment. A *prima facie* right to recover was therefore established under Proposition 1. Applying Proposition 2(a), there was no basis for finding or deeming an intention on the part of RBC to make the payment regardless of any potential forgery. Applying Proposition 2(b), BMP had given no consideration for the payment. Applying Proposition 2(c), no change of position had occurred. Accordingly, RBC could establish a sound claim to recover the moneys paid at common law.

It will be useful to explicate certain aspects of the court's application of the *Simms* test in greater detail. In considering Proposition 2(a) — *i.e.*, the requirement that the payer not have intended that the payee keep the money in all events (or be deemed to have done so) — Deschamps J. considered this the appropriate rubric within which to consider whether the payer bank ought to be required to absorb the loss on policy grounds relating to the concept of “finality of payment”. In other words, in the interest of supporting the policy that negotiable instruments should be considered, to the extent possible, as equivalent to cash, one might deem the bank to have intended to pay regardless of whether the cheque was forged or not.<sup>24</sup> Although the principle of “finality of payment” was said by Deschamps J. to underlie both the common law rules and pertinent provisions of the *Bills of Exchange Act*, this general goal “as laudable as it is . . . does not negate rights that may otherwise accrue to a party. It cannot be raised by a payee as an indiscriminate bar to the recovery of a mistaken payment”.<sup>25</sup> On this point, Deschamps J. found helpful the following observation of Stephen Scott, made in the pages of this journal:

[N]o very convincing reason can be offered for refusing the drawee relief in the single instance where the mistake involves acceptance or payment on a forged drawer's signature, whilst relief is freely given to the drawee on all *other* acceptances or payments by a mistake (including indeed various other kinds of forgeries; even the case where the drawer's own endorsement is forged on a bill payable to his order) (s. 129(b)).<sup>26</sup>

Further, one might add on the *Global* facts, no very convincing reason

24. Although, in my view, it is quite appropriate to consider whether this policy consideration should preclude recovery, it does not seem necessary to go through the somewhat artificial exercise of characterizing this as a basis for a deemed intention to pay in any event. Policy considerations arising from the legal nature of negotiable instruments are surely relevant to the disposition of the claim without such a characterization.

25. *Supra*, footnote 1, at para. 35.

26. S.A. Scott, “Comment on Benjamin Geva's paper: ‘Reflections on the Need to Revise the Bills of Exchange Act — Some Doctrinal Aspects’” (1981-82), 6 C.B.L.J. 331 at p. 342. The pertinent provision of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 is now numbered 128(b).

can be offered for allowing BMP or its principals to retain the fruits of the fraud perpetrated by the forger. It is difficult to imagine a more uncongenial fact situation in which to test out the merits of a broader “finality of payment” rationale. One would need a particularly devoted faith in the importance of treating negotiable instruments as equivalent to cash in order to justify what many would instinctively consider to be the rather substantial unjust enrichment of BMP and its principals on the present facts.

In order to reach this conclusion, Deschamps J. needed to circumvent some potential difficulties, which require only brief mention for present purposes. First, BMP sought to rely on the combined effect of ss. 128 and 165 of the *Bills of Exchange Act*<sup>27</sup> in support of the proposition that BNS was a holder in due course of the forged instruments and, accordingly, was not vulnerable to a claim by RBC. Section 128(a) provides as follows:

128. The acceptor of a bill by accepting it is precluded from denying to a holder in due course

(a) the existence of the drawer, *the genuineness of his signature* and his capacity and authority to draw the bill; (emphasis added)

Section 165(3) provides the following:

(3) where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all of the rights and powers of the holder in due course of his cheque.

As Deschamps J. noted, these provisions do have the consequence that BNS would be entitled, in defence of a claim brought by RBC to recover the moneys paid by mistake, to raise the defence that it is, by statute, constituted as a holder in due course. BNS would thus be in a position to successfully defend the claim. For Deschamps J., however, the fact that BNS would be entitled to do so did not mean that it was required to do so. It was open to BNS to refrain from taking advantage of its statutory entitlement. Accordingly, the decision made by BNS to restore the moneys to RBC does not conflict with its status as a holder in due course. Further, the fact that BNS could have relied on its statutory holder in due course status was of no assistance to BMP. As far as the position of BMP itself as a holder of the instrument was concerned, the fact that it had not given value for the instrument precluded it from acquiring the status of a holder in due course. Accordingly, it could not raise a defence under s. 128.

BMP had also placed reliance on the provisions of its contractual relationship with BNS. It urged that its agreement with BNS did not

---

27. *Ibid.*

explicitly permit BNS to restrain the funds in these circumstances and restore them to RBC. Deschamps J. dismissed this argument on the basis that s. 17(3) of that agreement specifically retained the banker's rights at common law with respect to "loans, set-offs, deposits and banking matters" even if such rights are not described in the agreement.<sup>28</sup> On this basis, Deschamps J. held that the agreement did not preclude the application of the common law in circumstances where a payment has been made under a mistake of fact. Finally, BMP argued that the clearing rules constituted an obstacle to recovery. This argument was rejected on the basis that the clearing rules operate at the level of banking and similar institutions and have no impact on the private law rights inherent in the banker/customer relationship or the remedies available to the parties to such relationships. On the basis of the foregoing analysis, then, Deschamps J. concluded that there was no basis for a holding, under the *Simms* test, that RBC intended, or is deemed in law to have intended, that BMP receive the funds in any event.

Deschamps J. then turned to consider Propositions 2(b) and 2(c) of the *Simms* test — whether consideration was given by BMP and whether a change in position had occurred. As noted above, it is plain that BMP gave no value for the instrument. With respect to change of position, however, the point is slightly more difficult, as it is the case that BNS, as collecting bank, had received the funds for the benefit of BMP and credited them to BMP's account. For Deschamps J., however, this did not constitute a true change of position because to the extent that the funds remained in BMP's account or related accounts with BNS, BNS remained the holder of the funds. The role of BNS had been transformed from that of a collecting bank to that of a holder of the funds under a contract with its customer under which the bank becomes the owner of the funds and becomes a borrower from or debtor of the account holder. Inasmuch as BNS remained the holder of the funds, it had not changed its position. Similarly, BMP, to the extent that funds being claimed were still credited to its account, had not suffered a change of position.

In sum, then, the *Global* decision offers a clear rule for permitting recovery in some instances of moneys paid by a drawee over a forged instrument. Recovery is permitted in circumstances where the *Simms* test is applicable and, more particularly, where the recipient of the funds is neither a holder in due course (thereby attracting protection under s. 128) nor has engaged in detrimental reliance of the type that would support a change of position defence. As Deschamps J. noted,

28. *Supra*, footnote 1, at para. 52.

however, the circumstances in which moneys mistakenly paid by a drawee bank on a forged cheque are recoverable are very likely to be rare. As she observed: "It is worth noting that cases in which a person who is not a party to the fraud has neither given consideration nor changed its position may be rare."<sup>29</sup> Rare though such cases might be, the right to recover is now a clearly recognized feature of Canadian restitutionary law.

An important point that is at least implicit in the holding in *Global* relates to the relationship between the collecting bank and its customer, the payee or endorsee. If the customer is not a holder in due course and has not suffered a change of position, a collecting bank which has transferred the funds to its customer is entitled to recovery of the funds on the basis of *Global* from its customer. Further, it is apparent that the collecting bank is entitled to debit its customer's account in such circumstances. These propositions are necessarily entailed in the holding in *Global* that BNS was entitled in these circumstances to restrain the moneys in the *Global* accounts and return them to RBC. They are critical to the holding that BNS did not suffer a detrimental change of position.

Two further points of interest may be noted. First, although no reference is made by Deschamps J. to American experience, it is of interest — some might consider it reassuring — that the rule adopted by the Supreme Court in *Global* mirrors the equivalent rule in the American *Uniform Commercial Code*.<sup>30</sup> UCC 3-418, which deals with the recovery of a mistaken payment by the drawee on a forged cheque, provides that remedies "may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment".<sup>31</sup>

Further, it is of some interest that there is now some distance between Canadian law and the controversial English decision in *National Westminster Bank Ltd. v. Barclays Bank International Ltd.*<sup>32</sup> In that case, Kerr J. allowed a claim by a drawee bank against the payee of the forged cheque, notwithstanding the fact that the payee had given consideration for the cheque. Kerr J. defended this result on the basis that the doctrine of *Price v. Neal* (denying relief) was applicable only to endorsees, rather than payees, and on the basis, perhaps, that *Price v. Neal* was a case in which the plaintiff drawee had conducted himself in such a way as to encourage the holder to assume

29. *Ibid.*, at para. 65.

30. American Law Institute, *Uniform Commercial Code*, Official Text (St. Paul, Thomson/West Publishing, 2007).

31. *Ibid.*, § 3-418(c) (amended 2002).

32. [1975] 1 Q.B. 654.

that the drawee believed the signature to be genuine. For Kerr J., no similar estoppel was raised by the conduct of the drawee in the *National Westminster* case. We need not linger over the criticisms that can be made of a rule that distinguishes between claims against payees as against those brought against endorsees.<sup>33</sup> The important point for present purposes is that under the *Global* doctrine, the defendant in *National Westminster*, presumably, would be able to successfully raise a change of position defence.

#### 4. Canadian Restitutionary Law and the Role of the Unjust Enrichment Principle

Although the analysis in *Global* of the basic mistaken payments rule and its application to the context of forged cheques represent valuable contributions to the clarification and evolution of the Canadian law of restitution, perhaps the most important contribution of the decision in *Global* is its clarification of the relationship between the unjust enrichment principle and garden-variety restitution claims, such as those for the recovery of mistaken payments. This point is of enormous practical significance for the practising profession and the judiciary. The rather traditional position taken on this point by the Supreme Court in *Global* will attract controversy among admirers of the late Oxford Regis Professor of Civil Law, Peter Birks. In order to demonstrate the significance of *Global* on this issue, it is necessary to portray, if only briefly, certain controversies concerning the scope and structure of the law of restitution and its relationship to the underlying principle against unjust enrichment.

The basic idea that “restitution” could usefully be recognized as a third branch of the private law of obligations, in addition to contract and tort, was the invention of the American Law Institute and formed the conceptual framework for the *Restatement of Restitution*,<sup>34</sup> published in 1937. Although the *Restatement of Restitution*, like the companion volumes on contract and tort, were essentially restatements of existing law, it was nonetheless a work of remarkable innovation. The underlying idea was that large bodies of existing common law and equity doctrine, hitherto neglected by the authors of treatises on private law, could be brought together and restated as a subject or branch of the law unified by an underlying principle against unjust enrichment. That principle was articulated in

33. See Geva, *supra*, footnote 21, at pp. 308-13.

34. American Law Institute, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (Philadelphia, American Law Institute Publishers, 1937).

s. 1 of the *Restatement* in the now familiar form: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."<sup>35</sup>

The common law doctrines restated in the *Restatement of Restitution*, often referred to previously as the law of quasi-contracts, include the recovery of moneys paid by mistake, under compulsion, under ineffective transactions and more generally, the recovery of benefits conferred in these and under various other circumstances. The equitable materials include various doctrines associated with the granting of constructive trust relief and a variety of other equitable remedies. Thus, for example, the law of fiduciary obligation plays a central role in the *Restatement's* treatment of the newly organized and restated law of restitution. The basic idea of the tripartite division of the law into contract, tort and restitution was that, if one internalizes the three paradigms of contract (the enforcement of promises), tort (compensation for injuries caused by wrongful conduct), and restitution (recovery of benefits unjustly retained), one will have in one's head a conceptual framework around which one can organize, and hopefully remember, the general principles and at least some of the details of virtually all of the private law of obligations.

At the risk of belabouring the point, it will be obvious that the law of restitution existed for years — indeed hundreds of years — prior to the publication of the *Restatement* in 1937. The *Restatement* merely reorganized the doctrine and restated it in a more convenient form. The success of such an exercise, of course, would be measured by the extent to which the profession in the United States and elsewhere found the conceptual framework to be a useable and helpful one. The new subject enjoyed success of this kind in the United States. A new version of the *Restatement* is currently in progress.<sup>36</sup> Much later in the twentieth century, lengthy treatises on restitution, covering more or less the same ground as that covered in the *Restatement*, appeared first in England,<sup>37</sup> then in Canada,<sup>38</sup> Australia<sup>39</sup> and New Zealand.<sup>40</sup>

35. *Ibid.*, at p. 16.

36. American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (Tentative Draft No. 1) (Philadelphia, American Law Institute Publishers, 2001) and subsequent tentative drafts. This work is nearing its completion.

37. R. Goff and G. Jones, *The Law of Restitution* (London, Sweet & Maxwell, 1966), now, as of 2007, in its 7th edition.

38. P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora, Canada Law Book Inc., 1990), now in its 2nd edition and subsequent looseleaf edition.

39. K. Mason and J.W. Carter, *Restitution Law in Australia* (Sydney, Buttersworth, 1995).



It would not be necessary, of course, for an exercise in restatement of this kind to receive a judicial imprimatur. Thus, there is no leading case one can identify in which an English court gave its blessing to the early 19th century recognition of contracts as a subject by the writers of textbooks on that new subject or of the recognition in the late 19th century of torts as a second branch of the law of obligations by the writers of texts on that new subject. It is therefore an interesting feature of the Canadian law of restitution that, among Commonwealth courts, the Supreme Court of Canada has led the way in explicitly adopting the unjust enrichment model as the underlying principle of the Canadian common law of restitution.<sup>41</sup> In 1954, the Supreme Court of Canada placed reliance on the unjust enrichment principle as an explanation for the granting of relief in a quasi-contract case, *Deglman v. Guaranty Trust Co. of Canada*.<sup>42</sup> More than two decades later, the Supreme Court articulated the unjust enrichment principle as the principle underlying the law relating to constructive trusts in *Pettkus v. Becker*.<sup>43</sup> The *Pettkus* decision was a much more controversial one as it involved the recognition of a new type of restitutionary claim in the context of matrimonial property disputes, thereby overruling relatively recent Supreme Court of Canada authority to the contrary effect.<sup>44</sup>

In *Pettkus*, Dickson J. famously restated the unjust enrichment principle in his own words, in his assertion that “there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and an absence of any juristic reason for the enrichment”.<sup>45</sup> It remains unclear why Dickson J. was moved to articulate the principle in this form. It is beyond doubt, however, that he was engaged in articulating the principle which he believed to underlie an existing body of doctrine rather than, for example, offering a basis on which all prior restitutionary doctrine would be considered to be overruled. At the same time, it was abundantly clear that Dickson J. was of the view that the underlying unjust enrichment principle could provide a basis for extending or modifying existing doctrine. No better evidence of this is needed than the holding in *Pettkus* itself. Moreover, when the test for unjust enrichment is employed for this purpose, it has the

40. R.B. Grantham and C.E.F. Rickett, *Enrichment and Restitution in New Zealand* (Oxford, Hart Publishing, 2000).

41. See, generally, Maddaugh and McCamus, *supra*, footnote 10, ch. 2.

42. [1954] 3 D.L.R. 785, [1954] S.C.R. 725.

43. *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834.

44. *Murdoch v. Murdoch* (1973), 41 D.L.R. (3d) 367, [1975] 1 S.C.R. 423.

45. *Supra*, footnote 43, at pp. 273-74.

appearance of functioning essentially as a cause of action and it is now Canadian practice to plead it as such.<sup>46</sup> Indeed, the current and unique Canadian practice is to plead restitutionary claims twice, once in terms of the existing law — such as the rules relating to the recovery of mistaken payments, or of benefits extracted by duress, or to strip fiduciaries of their ill-gotten gains, and so on — and a second time in terms of the *Pettkus* tripartite formula.<sup>47</sup>

In England, although the *Restatement's* concept of the nature and scope of the law of restitution was essentially adopted by Goff and Jones in their pioneering treatise<sup>48</sup> and by the authors of subsequent treatises<sup>49</sup> on English restitutionary law, one prominent English scholar, Professor Peter Birks, rejected the *Restatement* model and developed his own set of conceptual categories and new and more restrictive meanings for existing terminology such as “restitution” and “unjust enrichment”. As well, he developed a new terminological vocabulary to identify the new categories and sub-categories of the subject or, rather, subjects, which he considered to be constituted by the terrain covered by the *Restatement* model. The Birksian model is highly complex. Indeed, in my view at least, its complexity is one of its major deficiencies. Moreover, Birks's views changed over time —

46. Although it is Canadian practice that a simple pleading in unjust enrichment is acceptable (indeed, prudent) in a restitution case, the result of its successful application, as in *Pettkus* itself, is not so easily characterized as a simple application of an unjust enrichment “cause of action”. The holding in the case is that one who holds exclusive title to property created through joint effort with a spouse or equivalent is obliged, upon dissolution of their relationship, to share the value thus created. This appears to be, surely, a different kind of claim than, say a claim for moneys paid under a mistake or pursuant to an ineffective contract or under duress or the recovery of the ill-gotten gains of a fiduciary or of benefits conferred in an emergency. The newly recognized matrimonial property claim may be of the genus unjust enrichment but is surely a different species than these other types of restitutionary claims. The elements of the restitutionary claim available in the context of dissolution of marriage and similar relationships are explored in J.D. McCamus, “Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?” in J. Neyers, M. McInnes and S. Pitel, eds., *Understanding Unjust Enrichment* (Oxford, Hart Publishing Co., 2004), ch. 14.

47. Although the pleader cannot be faulted for this exercise in redundancy — a prudent pleader wishes to ensure that all possible bases are covered — the existence of the practice is evidence of the confusion concerning the relationship between the existing rules and the underlying unjust enrichment principle that has emerged in the wake of *Pettkus*, *supra*, footnote 43, and *Garland*, *supra*, footnote 3.

48. *Supra*, footnote 37.

49. See, e.g., A. Burrows, *The Law of Restitution*, 2nd ed. (London, Butterworths, 2002) and G. Virgo, *The Law of Restitution*, 2nd ed. (Oxford, Oxford University Press, 2006).

thereby adding further complexity — with the result that a full and accurate portrayal of his views concerning the structure of restitutionary law cannot be accomplished in a short compass. For present purposes, however, a brief portrayal of the main themes of his most recent work should suffice.

First, Birks has long been of the view that “restitution” is an inappropriate name for the subject and that it should more properly be called “unjust enrichment”.<sup>50</sup> Second, in his first major work on restitution,<sup>51</sup> Birks drew a distinction between two classes of restitutionary claims. The first was constituted by cases involving the recovery of benefits transferred by the plaintiff to the defendant, which he called “subtraction” cases. The second category were claims involving “restitution for wrongs”, the latter category including, for example, claims for restitution for breach of fiduciary duty. The defining characteristic of cases in this second category, in his view, was that benefits could be recovered by the plaintiff, whether or not the benefit unjustly acquired had been transferred by the plaintiff to the defendant. Birks was of the opinion that a striking difference between the “subtraction” cases and the “restitution for wrongs” cases was that cases in the former category constituted “autonomous unjust enrichment” in the sense that the unjust enrichment principle was the exclusive source of liability. In cases of restitution for wrongs, on the other hand, unjust enrichment provided a remedy for a wrong defined by some other category of law such as tort or fiduciary obligation (equity). Autonomous unjust enrichment is, in some sense, primary, whereas restitution for wrongs is “parasitic” and, in some sense, secondary to another field of law.<sup>52</sup>

50. P.B.H. Birks, “Misnomer” in W.R. Cornish *et al.*, eds., *Restitution: Past, Present and Future* (Oxford, Hart Publishing, 1998), ch. 1. For the suggestion, *inter alia*, that this terminological change is unnecessary and will serve to confuse the profession, see A. Tettenborn, “Misnomer — a Reponse to Professor Birks” in W.R. Cornish *et al.*, *ibid.*, p. 31; A. Burrows, “Quadrating Restitution and Unjust Enrichment: A Matter of Principle?”, [2000] *Rest. L. Rev.* 257. For a more admiring account, see M. McInnes, “Misnomer: A Classic”, [2004] *Rest. L. Rev.* 79.

51. P.B.H. Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985).

52. A critique of this “parasitic” theory of restitution for wrongs is beyond the scope of this article. Suffice it to say here that, in my view, this distinction between primary and secondary liability is not useful. The rules imposing restitutionary liability for breach of fiduciary liability, for example, are clearly primary in nature. See, “The Nature of Waiver of Tort” in J. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford, Clarendon Press, 1990), pp. 206 *et seq.* and D. Friedmann, “Restitution for Wrongs: the Basis for Liability” in W. Cornish *et al.*, eds., *supra*, footnote 50, ch. 9.

In his earlier work,<sup>53</sup> Birks had referred to both of these two categories as “unjust enrichment”. In his later work,<sup>54</sup> however, he came to the view that the *Restatement* scheme was incoherent in that these two categories were actually separate branches of the law and that the term unjust enrichment should be exclusively reserved for the subtraction category.<sup>55</sup> Indeed, it was his view that the subtraction category should be very narrowly conceived and would include only cases of benefits conferred by mistake, under duress and by means of ineffective transactions. These, in his view, were true cases of “unjust enrichment”. In addition to “unjust enrichment” (hard core) and restitution for wrongs, then, some excluded elements of traditional restitution were hived off into a category of so-called “other” claims.

Finally, in his latest work,<sup>56</sup> Birks offered his most radical proposal. He urged that “unjust enrichment”, as narrowly conceived by him, was the subject of unsatisfactory doctrine in English law. It was, in his view, unfortunate that English law required a plaintiff to identify a reason why the plaintiff should be entitled to relief such as the fact that the benefit was conferred by mistake, under duress, or by way of an unenforceable contract — he referred to these as “unjust factors”. Rather, it was his view that the civilian systems had a much better idea — he expressed a preference, in fact, for the German civilian model — in requiring merely that the plaintiff establish an “absence of basis” for the transfer of value from the plaintiff to the defendant. In short, Birks proposed that the existing common law be rejected and replaced by a principle drawn from civilian jurisprudence with which he had considerable familiarity.<sup>57</sup>

For restitution scholars, Birks’s works are a source of fascination. Even those of us who find the work essentially unhelpful concede the

53. *Supra*, footnote 51.

54. P.B.H. Birks, *Unjust Enrichment*, 2nd ed. (Oxford, Oxford University Press, 2004).

55. For a defence, at the level of high theory, of the more traditional view that the scope of restitution is most usefully considered to include both forms of “benefit-based” liability, *i.e.* both subtraction cases and restitution for wrongs, see K. Barker, “Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons” in J. Neyers, M. McInnes and S. Pitel, eds., *Understanding Unjust Enrichment* (Oxford, Hart Pub. Co. 2004), ch. 5.

56. *Supra*, footnote 54.

57. In defence of the traditional common law method of requiring the plaintiff to explain why he or she is entitled to recover (in terms such as “mistake” or “duress” etc., that a common lawyer and, indeed, a lay person are likely to understand), see K. Barker, “Responsibility for Gain: Unjust Factors or Absence of Legal Ground? Starting Points in Unjust Enrichment Law” in C. Rickett and R. Grantham, eds., *Structure and Justification in Private Law* (Oxford, Hart Pub. Co., 2008), ch. 4.

ingenuity and rigor of his analysis. Nonetheless, it can fairly be said that his work has not become a dominant influence in the mainstream of restitution scholarship and jurisprudence. The text books on restitution tend to cover the same ground covered by the *Restatement of Restitution*. Scholars and judges often use the terms restitution and unjust enrichment interchangeably to refer to the entire field covered by the *Restatement*. English courts, apparently unaware of the superiority of the German model, doggedly persist in applying the existing English law (sometimes with appropriate modifications, of course) in restitution cases. Predicting the future course of common law doctrine in any jurisdiction is, of course, a chancy business. It does seem likely, however, that the English courts will continue along the current path of applying the existing common law. So too, one may reasonably anticipate, will the courts in other common law jurisdictions such as Australia and New Zealand. There is simply not a chance, I would guess, that the Birksian model will take root in American jurisprudence. Birks's ideas do have a strong following, however, among a group of scholars — often referred to as Birks-ites — many of whom are former graduate students of his, who write about restitutionary topics employing Birksian terminology and categories.

What on earth, the patient reader may well ask, does any of this have to do with the Canadian common law of restitution? A central question for the Canadian law of restitution pertains to the relationship between the unjust enrichment principle and the existing rules relating to restitutionary liability. My own view,<sup>58</sup> admittedly rather traditional in nature, is that the unjust enrichment principle provides a theoretical or conceptual foundation for the existing law of restitution and may, in appropriate cases, provide a basis for judicial extension or modification of prior law. The principle provides a basis for supplementing or overruling prior doctrine, but it does not demolish all existing law. Canadian Birks-ites, however, appear to be attracted by the idea that the unjust enrichment principle has completely overruled and replaced all prior Canadian law and provides the exclusive basis for reasoning in restitutionary cases. Support for this view appears to be drawn from two sources. First, the careful reader will have noticed the similarity between the Birksian idea of adopting the civilian principle of “absence of basis” and the version of the unjust enrichment principle articulated by Dickson J. in *Pettikus*, which speaks of “absence of juristic reason”. This similarity, when coupled with the reasoning of Iacobucci J. in the recent decision

58. Maddaugh and McCamus, *supra*, footnote 10, ch. 3.

in *Garland v. Consumers Gas Co.*,<sup>59</sup> provides an opening for the argument that the Supreme Court of Canada has — unwittingly, we might interject — adopted the Birksian concept of replacing the existing common law jurisprudence with the civilian doctrine of “absence of basis” or something rather similar thereto.<sup>60</sup>

In *Garland*, it may be recalled, Iacobucci J. developed an innovative and unprecedented statement of the juristic reason analysis. Briefly stated, Iacobucci J. suggested that, as Dickson J. had done in *Pettkus*, when applying the unjust enrichment principle, the plaintiff should be required to establish a benefit, detriment and an absence of juristic reason for the transfer. To establish the latter point, however, Iacobucci J. further suggested that the plaintiff should be required to disprove the existence of the various possible reasons that the defendant might wish to rely upon for justifying the transfer. After proving this negative proposition,<sup>61</sup> the burden would then shift to the defendant to establish that either for reasons of “public policy” or on the basis of “reasonable expectations” of some kind, the defendant should be entitled to retain the benefit. Canadian Birks-ites appear to be of the view that in articulating this analysis, Iacobucci J. intended to overrule all prior Canadian restitutionary doctrine (or some as yet identified subset of restitutionary law) and replace it with his new absence of juristic reason analysis. As they are inclined to say, the Canadian law of restitution has been “Garlandized” and has adopted the Birksian/civilian notion of

---

59. *Supra*, footnote 3.

60. Another apparently unintentional similarity between the *Pettkus* formula and the eventual Birksian scheme is Dickson J.’s use of the term “detriment”, which can be interpreted strictly to exclude cases, such as *some* cases of breach of fiduciary duty where the fiduciary profits without a corresponding “detriment” or “expense” to the plaintiff. Again we can be certain that Dickson J. did not intend to casually overrule prior doctrine allowing restitutionary recovery under established doctrines — such as the law of fiduciary obligation — where no “detriment” or “expense” has occurred. Nor, it seems clear, did Dickson J. have in mind a radical restructuring of the entire field of restitution such as that ultimately envisaged by Birks.

61. Although Iacobucci J. conceded the difficulty inherent in requiring the plaintiff to prove a negative proposition, he attempted to cure this difficulty by suggesting that the list of juristic reasons could be confined, for the moment at least, to a requirement that the plaintiff establish an absence of contract, disposition of law, donative intent or other valid common law, equitable or statutory obligations. This is quite a handful for plaintiff’s counsel, imposing a burden to prove a negative proposition of quite uncertain amplitude. It is therefore not self-evident that this list meets the objection that the burden should not be on the plaintiff to disprove all the elements of a rather vague list of the arguments that might otherwise be available to the defendant.

“absence of basis” or some variant thereof as the governing principle — indeed, the *rule* to be applied — in all restitution claims.

Peter Maddaugh and I have elsewhere suggested that such views constitute a misreading of the *Garland* decision.<sup>62</sup> There are a number of reasons for our view that it was not the intention of Iacobucci J. in *Garland* to overrule all prior restitutionary law and replace it with his new version of the unjust enrichment principle. First, so radical a proposition as this is not likely to have been intended by a court that subscribes to the view that changes in the law should be incremental in nature.<sup>63</sup> Replacing the very large and variegated body of restitutionary doctrine with a single rule is a sufficiently startling proposition that one would expect the court to communicate that this dramatic change was intended. No such suggestion is made by Iacobucci J. in his opinion. Similarly, the thought that all prior common law on restitution was to be replaced by a civilian concept of “absence of basis” in the form of Iacobucci J.’s version of the “absence of juristic reason” concept is also so dramatic a reform of prior law that one would expect the court to communicate that a revolutionary change of this kind was intended. No statement to this effect is made in Iacobucci J.’s opinion.

Moreover, if one reviews Iacobucci J.’s opinion carefully, it appears evident that the view he expresses with respect to the role of the unjust enrichment is the traditional one — *i.e.*, that the unjust enrichment analysis will fill in gaps or supplement or modify existing doctrine, but not simply replace it. The clearest signal to this effect is that Iacobucci J. indicated that he was merely elaborating on the general approach to unjust enrichment endorsed by McLachlin J. in *Peel (Regional Municipality) v. Ontario*.<sup>64</sup> In that case, McLachlin J., for the Supreme Court of Canada, offered a very traditional view of the role of the unjust enrichment principle in restitutionary law. The now Chief Justice indicated that a balance is to be struck between the existing rules or doctrines of the law and the need for a flexible instrumentality for modifying prior law so as to allow the law “to develop in a flexible way as required to meet changing perceptions of justice”.<sup>65</sup> She recommended “a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the categories of recovery; one which charts a predictable course without falling into the trap of

62. Maddaugh and McCamus, *supra*, footnote 10, § 3:200:30.

63. See, *e.g.*, *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 at pp. 436-37, 97 D.L.R. (4th) 261, *per* Iacobucci J.

64. (1992), 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762.

65. *Ibid.*, at p. 155.

excessive formalism”.<sup>66</sup> As McLachlin C.J.C.’s reasons in *Peel* illustrate, the proper approach to the analysis of a restitutionary problem is to start with the existing law and, if it is considered to be unsatisfactory for some reason, one may rely on the basic underlying unjust enrichment principle to fill in gaps in the law or modify the traditional doctrine.

Further, the fact that Iacobucci J. referred to the unjust enrichment analysis as being “relatively new to Canadian jurisprudence”<sup>67</sup> and expressed his intention as being one of providing clear guidance in the application of the test to trial judges, strongly suggests that he was not intending to hand trial judges a blank slate by wiping out all prior law and replacing it with his new juristic reason analysis. It seems apparent that his analysis was intended to apply where resort is to be made to the newly recognized underlying principle.

At the same time, however, it must be conceded that the reasoning of Iacobucci J. in *Garland* does not plainly and explicitly state that it is intended merely to supplement, rather than supplant, all prior restitutionary law. Accordingly, the reasoning in this case has provided an opening for Canadian Birks-ites to insist that this dramatic and revolutionary change has occurred. Canadian law has been “Garlandized”, in their view, and all pre-*Garland* authority can be simply ignored. The Canadian common law, they insist, must now be reinvented and rewritten on the basis of a civilian rule with which few, if any, common lawyers have more than passing familiarity.<sup>68</sup>

It is not entirely clear what the views of Canadian Birks-ites would be with respect to the scope of their favoured “Garlandization” of Canadian restitutionary law. It might be their view that it would apply to all of the traditional law of restitution — that is, roughly speaking, to the materials covered in the table of contents of the *Restatement of Restitution* and the mainstream treatises. Perhaps a more likely view is that it would apply only to what has been referred to above in Birksian terminology as the “subtraction” cases or, indeed, it may be their view that it would apply only to the hard core of subtraction cases identified by Professor Birks in his last work as

66. *Ibid.*, at p. 153.

67. *Supra*, footnote 3, at p. 401.

68. Lack of familiarity is far from the only problem with the proposed Birksian/Garlandization of the common law. The inter-connectedness of legal rules makes the importing of rules from one system into another — the problem of so-called “legal transplants” — a hazardous exercise. For brief discussion of the difficulties of moving “absence of legal basis” into the common law for this reason by a comparatavist, see T. Krebs, in “Review Article, The New Birksian Approach to Unjust Enrichment”, [2004] *Rest. L. Rev.* 260 at pp. 273-76.



constituting the true cases of unjust enrichment. All Birks-ites would agree, however, that the Birksian analysis would apply to a case involving the recovery of a mistaken payment. For Birks, this is the central illustration of the hard core of true unjust enrichment cases. Accordingly, we may assume that a Canadian Birks-ite would take the view that when analyzing a mistaken payments case, one should simply apply the Garlandized version of the benefit/detriment/juristic reason test first articulated in *Pettikus*, then refined in *Garland*, and simply ignore all prior doctrine or case law.

When we turn to examine the reasoning in *Global*, however, it is striking that no such analysis is offered. Indeed, Deschamps J. applies the traditional model of analysis, embraced by McLachlin J. in the *Peel* case, and begins with an examination of the existing law. Using the traditional analytical methods of the common law in terms of examining the cases, identifying their true rationales, considering various policy considerations related to the proper interpretation of those precedents, Deschamps J. offers an interpretation of the law of mistaken payments, which represents, as suggested earlier, an important and valuable restatement of the law of mistake. The remedy is said to be “restitution” rather than one of “unjust enrichment”. No reference is made to the juristic reason analysis in *Garland*. No mention is made of the “absence of basis” reasoning that one might draw from the civil law. The reasoning is, in short, an exemplar of the kind of approach one would expect from a common law appellate court dealing with a difficult problem and reasoning through to a solution on the basis of an analysis of prior authorities.

The analysis in *Global* should be very reassuring to lawyers and judges confronting the professional tasks of preparing opinions and arguments, giving advice to clients and writing judgments. A true Garlandization of all or some subset of Canadian restitutionary law would simply plunge the profession into a deepening spiral of uncertainty and confusion about the content of the law of restitution. Jettisoning the existing law and replacing it with the rather vague analysis of juristic reasons, policy considerations and reasonable expectations articulated in *Garland* is a recipe for enormous instability and unpredictability in restitutionary doctrine. Although such an adventure is no doubt attractive to some academics, I certainly do not find it attractive. I very much doubt that members of the profession do so either. Accordingly, the reasoning in *Global* is a welcome reassurance that the reasoning in restitution cases will continue, as it has done for a very long time, to rest upon an interesting blend of precedent and principle, as, indeed,

is the case in other branches of private law. To be sure, the need to resort to the general principle may play a larger role in restitution to the extent that it may be a less well developed or modernized branch of the law than contract and tort. But the relationship between principle and precedent in restitution is not different in kind, I would suggest, then their interactions in these other two branches of the law.

## 5. Conclusion

In summary, it is my view that the decision of the Supreme Court of Canada in the *Global* case represents a very valuable contribution to the development of Canadian restitutionary law. First, by clarifying the status in Canadian law of Goff J.'s, as he then was, elegant restatement of the mistaken payments rule in *Barclay's Bank*, the Supreme Court has cleared away the doctrinal debris created by the unduly complex and incoherent traditional version of the mistaken payments doctrine. In brief, the new rule is that mistaken payments are recoverable if the mistake caused the payment unless (i) the defendant can show a payer intention that the payee keep the money in any event or regardless of the possibility of error, or (ii) the giving of consideration by the payee for the payment in question, or (iii) the payee is able to establish a valid change of position defence.

Second, the court has offered a clear pronouncement on the contentious question of the right of a drawee bank to recover moneys mistakenly paid out on a forged cheque. Such a claim will enjoy success unless the recipient has either acquired the status of a holder in due course or is entitled to establish a valid change of position defence. The rule is elegant, based on clear reasoning, consistent with the American rule on point and has the advantage of providing a result on the *Global* facts that accords with one's intuitive sense of the fair result.

The third and perhaps most important point made by the *Global* decision relates to the relationship between the unjust enrichment principle and existing restitutionary doctrine. The central question on this point is whether the general principle recognized in *Pettus* and refashioned in *Garland* is intended to either supplant all prior restitutionary law or, more modestly, to provide a basis for supplementing and modifying the existing doctrines of the law of restitution. Consistently with the views expressed by the current Chief Justice in *Peel (Regional Municipality) v. Ontario* and, in my view at least, by Iacobucci J. in the *Garland* case itself, the reasoning in *Global* illustrates the proposition that, when one analyzes a

restitution problem, one should adopt, as one's first port of call, an examination of the existing law on point. The unjust enrichment analysis will provide, in an appropriate case, a basis for filling in gaps in the existing law or modifying traditional doctrines which appear to be inconsistent with the unjust enrichment principle. Although this proposition is, in my view, quite unremarkable and completely consistent with the common law method applicable throughout the private law of obligations in common law Canada and in other common law jurisdictions, Canadian Birks-ites will be disappointed, perhaps even dismayed, by the *Global* decision. For them, it may appear as a rejection of the proposition that the *Garland* reasoning is properly interpreted as providing the basis for turning Canadian restitutionary common law into an isolated common law laboratory for experimentation with Professor Birks' suggestion that the existing common law of restitution or, rather, unjust enrichment (perhaps as most recently narrowly conceived by him) ought to be replaced by a doctrine based on the civilian doctrine of "absence of basis". For non-Birks-ites, however, the *Global* decision will be received as a welcome signal that the radical uncertainty and confusion that would be introduced into Canadian restitutionary law by such an experiment is not what is intended by the Supreme Court of Canada. The common law branch of the Canadian legal profession may draw a long breath and breathe a heavy sigh of relief.

John D. McCamus\*

---

\* Professor of Law and University Professor at Osgoode Hall Law School, York University.